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# Confronting Totalitarianism at Home: The Roots of European Privacy Protections

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# CONFRONTING TOTALITARIANISM AT HOME: THE ROOTS OF EUROPEAN PRIVACY PROTECTIONS

*Hannah Bloch-Wehba\**

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## INTRODUCTION

Before entering politics, Joseph Goebbels tried his hand at literature. As perhaps is not uncommon among young politicians, Goebbels wrote a novel in his mid-twenties.<sup>1</sup> Instead of allowing his book to gather dust in a drawer somewhere, Goebbels published his book in 1929 with the title *Michael: A German Destiny in Diary Pages*. The novel was subsequently published by the central press of the National Socialist party and went through seventeen printings by 1942.<sup>2</sup> The book, which was written before Goebbels ascended to his role as chief propagandist for the Nazi party, includes signals of political positions which were yet to come to fruition:

The mission of women is to be beautiful and to bring children into the world. This is not at all as rude and unmodern as it sounds. The female bird pretties herself for her mate and hatches the eggs for him. In exchange, the mate takes care of gathering the food, and stands guard and wards off the enemy.<sup>3</sup>

Goebbels' book was published without the ominous-seeming subtitle in the United States.<sup>4</sup> But the stilted, irate view of "those loud women who mix themselves up in any- and everything, without understanding any of it" did presage what would become an important aspect of Nazi government and philosophy.<sup>5</sup> Women's highest calling would be to bear children; men would protect those children. Women should not "mix themselves up" in the public world; their own, private sphere was the foundation of everything else.<sup>6</sup>

In the current era of equal opportunity, statements like Goebbels' seem antiquated and far removed from the concerns

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1. Tom Clark, *The Nazi Wrote a Novel*, L.A. TIMES, Oct. 25, 1987, [http://articles.latimes.com/1987-10-25/books/bk-16144\\_1\\_joseph-goebbels](http://articles.latimes.com/1987-10-25/books/bk-16144_1_joseph-goebbels).

2. JOSEPH GOEBBELS, *MICHAEL: EIN DEUTSCHES SCHICKSAL IN TAGEBUCHBLÄTTERN* (1942), available at <https://archive.org/details/Michael-einDeutschesSchicksalInTagebuchblaettern>.

3. Claudia Koonz, *The Competition for a Women's Lebensraum, 1928-1934*, in *WHEN BIOLOGY BECAME DESTINY: WOMEN IN WEIMAR AND NAZI GERMANY* 199, 210 (Renate Bridenthal, Atina Grossman & Marion Kaplan eds., 1984) (quoting Goebbels).

4. Clark, *supra* note 1.

5. GOEBBELS, *supra* note 2, at 42.

6. See *id.* at 123 ("Heimat! Erde! Mutter!")(trans.: "Home! Earth! Mother!").

of contemporary women. Yet the concept of women's role in society that he expounded was at the core of the Nazi-racial state and served as the rationale for the development of an elaborate, totalitarian system of monitoring, censorship, incentives, and punishment. In the United States, constitutional privacy law is understood to protect against the growth of a "police state"—to prevent precisely this type of abuse by state institutions.<sup>7</sup> However, scholarly accounts claim that European privacy law, which emerged from a background of totalitarian repression, is unlike American law. It focuses not on liberty, but instead dignity.<sup>8</sup> Rather than responding to a legacy of totalitarian rule, European privacy law is said to have emerged from a nineteenth-century tradition of honor and dueling that was primarily focused on reputational concerns—on one's privacy vis-à-vis one's fellow citizens, not the state.<sup>9</sup> This divergence has given rise to "two different cultures of privacy," one oriented toward the state and one oriented toward society.<sup>10</sup>

In the wake of revelations that the American intelligence community has secretly collected data on millions of people, including political leaders abroad, our understanding of the similarities—and differences—between European and American privacy law has taken on new significance.<sup>11</sup> This Article claims that contemporary European norms on privacy emerged against a background of unprecedented state surveillance and intrusion on "private life" during the Third Reich. Human

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7. See, e.g., *Boyd v. United States*, 116 U.S. 616, 624–25 (1886) (recalling that the basis for the Fourth Amendment was the Framers' opposition to revenue officers' use of writs of assistance, "empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'").

8. James Q. Whitman, *Two Western Cultures of Privacy*, 113 YALE L.J. 1151, 1163 (2004).

9. *Id.* at 1166–67.

10. *Id.* at 1160–61.

11. See, e.g., Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN, June 5, 2013, <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>; Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, June 6, 2013, [www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497\\_story.html](http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html).

rights are usually conceived of as having developed as a result of the Holocaust and Nazi abuses.<sup>12</sup> The human right to privacy, as set forth in the European Convention on Human Rights and German Basic Law, is no different. Yet a close examination of the development of European privacy law in the immediate post-World War II context reveals that legislators struggled to respond to a particular type of privacy violation: an infringement of the right to privacy in the home. Surprisingly, the government's legacy of misuse of personal information, infiltration of dissident-political groups, or interception of communications did not take center stage. Instead, the framers of these post-war privacy laws were concerned about securing the right—a *man's* right—to run one's family as he wished, in opposition to Nazi policies that placed the government squarely in charge of reproduction, family, and marriage.<sup>13</sup>

The Article proceeds as follows. Part I argues that family policy under the Third Reich represented a departure from historical norms that protected the "private sphere" from government intervention. Nazi policy toward Aryan mothers and toward "undesirable elements" required unprecedented interference with the traditionally "private" realm of marriage, family, and reproduction. Part II analyzes the legislative history of the European Convention on Human Rights as well as the German Basic Law to support the claim that the framers of these key post-war legal instruments were responding to a legacy of unprecedented intrusion on the historically private sphere in addressing privacy protections. Scholarly accounts that attribute European privacy law to nineteenth-century traditions of "honor" undervalue the more recent history that underpins what this Article terms "public privacy law." Part III illustrates that in three discrete and seemingly unrelated areas of contemporary debate—conflict over law governing commercial enterprises' use of consumer data, citation of foreign law, and counterterrorism surveillance—the conception that U.S. and European norms are in conflict is still very much alive. The Article con-

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12. See, e.g., SABINE C. CAREY, MARK GIBNEY, & STEVEN C. POE, *THE POLITICS OF HUMAN RIGHTS: THE QUEST FOR DIGNITY* (2010).

13. See generally CLAUDIA KOONZ, *MOTHERS IN THE FATHERLAND: WOMEN, THE FAMILY, AND NAZI POLITICS* (1987); Gisela Block, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, in *WHEN BIOLOGY BECAME DESTINY: WOMEN IN WEIMAR AND NAZI GERMANY* 271, 273 (Renate Bridenthal, Atina Grossman & Marion Kaplan eds., 1984).

cludes with observations on how anti-authoritarian and anti-totalitarian privacy norms might be emerging in the contemporary era.

# I. PRIVACY AND THE FAMILY IN THE THIRD REICH

As a result of the Industrial Revolution, World War I, and the emergence of the Weimar Republic, women's public status in Germany grew, albeit shakily, from the late nineteenth century until 1933.<sup>14</sup> It was not until 1908 that women could join political parties or receive university degrees.<sup>15</sup> During the First World War, women entered the economy as laborers; when the Kaiser surrendered and the Republic emerged in 1918, women received the right to vote.<sup>16</sup> These advances were short-lived: while the Nazis embraced a "right to join in the common labor of the community and a right to recognition, respect, and honor," women were again almost entirely excluded from public life.<sup>17</sup> Weimar-era progress, much of which was overstated to begin with,<sup>18</sup> was quickly rolled back in favor of a return to domesticity and to the "private sphere." Superficially, perhaps this did amount to an increase in the protection of privacy under the Third Reich, in the sense that "private life" was again firmly separated from public and protected by the law of reputation.<sup>19</sup> But in fact, private life was also the subject of increasingly totalitarian intervention by the state.

A central objective of the Third Reich was to accomplish the renewal of German society by eliminating racially problematic elements.<sup>20</sup> As Marxist historian Timothy Mason put it, "The purity of the blood, the numerical power, the vigour of the race

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14. KOONZ, *supra* note 13, at 25–26.

15. *Id.* at 25.

16. Nina Seppälä, *Women and the Vote in Western Europe*, in VOTER TURNOUT IN WESTERN EUROPE SINCE 1945: A REGIONAL REPORT 34 (Rafael López Pintor & Maria Gratschew eds., 2004), [http://www.idea.int/publications/voter\\_turnout\\_weurope/](http://www.idea.int/publications/voter_turnout_weurope/).

17. Whitman, *supra* note 8, at 1188.

18. Charu Gupta, *Politics of Gender: Women in Nazi Germany*, 26 ECON. & POL. WKLY. 40, 42 (1991).

19. Whitman, *supra* note 8, at 1188. *See also* Gupta, *supra* note 18, at 40 (describing the "extreme separation of spheres for men and women" instantiated under the Third Reich).

20. *See generally* IAN KERSHAW, *HITLER, THE GERMANS, AND THE FINAL SOLUTION* (2009) (analyzing the history and historiography of the Final Solution).

were ideological goals of such high priority that all women's activities other than breeding were relegated in party rhetoric to secondary significance."<sup>21</sup> Germany's declining birth rate at the time that Hitler came to power made it all the more imperative for women to reproduce.<sup>22</sup> Thus, as historian Charu Gupta has pointed out, "There was in fact a close connection between Nazi pro-natalism for 'desirable' births and its anti-natalism for 'undesirable' ones."<sup>23</sup> For Aryan women, Nazi ideology emphasized the proper role in the private sphere—heroicizing motherhood and domestic life, while undermining, if not denying outright, women's abilities to contribute to public life.<sup>24</sup> Jewish women, on the other hand, were overwhelmingly the target of forced sterilization, forced labor, and genocide.<sup>25</sup>

These policies bear on privacy in two distinct ways. First, Nazi policies toward family, motherhood, and reproduction replicated conceptual distinctions between "public" and "private" that reaffirmed the value of the home as a separate "sphere."<sup>26</sup> Second, although this development nominally suggests that "domestic" concerns would be subject to less state intervention than concerns in the "public" sphere,<sup>27</sup> the "private" sphere to which women were relegated was actually the target of unprec-

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21. Tim Mason, *Women in Germany, 1925-1940: Family, Welfare and Work. Part I*, 1 HIST. WORKSHOP 74, 88 (1976).

22. See Gisela Block, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, 8 SIGNS 400, 405 (1983) (pointing out that the decline in the German birthrate reached "an international low point" in 1932 and was attributed partly to a "birth-strike" by women).

23. Gupta, *supra* note 18, at 40.

24. Koonz, *supra* note 3, at 220.

25. See Gisela Block, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, in WHEN BIOLOGY BECAME DESTINY: WOMEN IN WEIMAR AND NAZI GERMANY 271, 273 (Renate Bridenthal, Atina Grossman & Marion Kaplan eds., 1984) ("[T]he Nazis were by no means simply interested in raising the number of childbearing women. They were just as bent on excluding many women from bearing and rearing children—and men from begetting them—with sterilization as their principal deterrent.").

26. See generally CAROLE PATEMAN, THE SEXUAL CONTRACT (1988) (discussing the distinction between public and private).

27. See, e.g., D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 257 (2006) (tracing the "favored treatment" homes receive in privacy law and other substantive areas of law).

edented regulation and surveillance.<sup>28</sup> Thus, despite the Nazi discourse around a “traditional” notion of womanhood and family life, the highly policed reproductive policies in the Third Reich actually represented a departure from historical norms about how the “private” sphere was governed.

*A. Kinder, Küche, Kirche*

Nazi policy and ideology on women, while by no means uniform,<sup>29</sup> advocated for an enhanced role for Aryan women in the home and a diminished role in the public sphere. While in the run-up to Nazi rule, women’s movements flourished, the coming of Hitler presaged a threat to “women’s claim to public status altogether.”<sup>30</sup> Thus, Goebbels’s statement that “a mother who is not everything to her children: friend, teacher, confidante, source of joy and constant pride, one who motivates, one who protects, one who accuses, pardons, judges and forgives—that mother has clearly failed her profession.”<sup>31</sup> Although the Nazis’ traditionalist notions of femininity meant that women were increasingly forced out of the public sphere, concepts of womanhood and motherhood nonetheless played an important role in public-facing Nazi propaganda and racial policy. Perhaps unsurprisingly, the Nazi movement embraced a conception of women as the safeguard of a racially pure state. As one contemporary commentator put it, “If women sink, the entire nation sinks; and if the whole *Volk* declines, then women bear the largest guilt.”<sup>32</sup> As a result, while women were ideally to be taken out of the public sphere, “the reproductive aspect of women’s unwaged housework,”<sup>33</sup> as historian Gisela Bock put it, was very much the subject of concern, regulation, and legislation.

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28. See, e.g., Christiane Eifert, *Coming to Terms with the State: Maternalist Politics and the Development of the Welfare State in Weimar Germany*, 30 CENT. EUR. HIST. 25, 47 (1997) (arguing that even political parties that were relatively committed to the feminist cause in Weimar Germany sought to preserve traditional gender roles in the home and insulate “privacy” within the home as “the natural right of every man”).

29. See generally Leila Rupp, *Mother of the “Volk”: The Image of Women in Nazi Ideology*, 3 SIGNS 362 (1977).

30. Koonz, *supra* note 3, at 220.

31. GOEBBELS, *supra* note 2, at 12 (trans. by author).

32. Koonz, *supra* note 3, at 215 (quoting Guida Diehl).

33. Block, *supra* note 22, at 271.



The racial necessity of reproduction rendered the Nazi concept of family “not a defense against public invasion as much as the gateway to intervention . . . . Government-sponsored family protection programs hastened the destruction of individualism and privacy.”<sup>34</sup> A primary example of this type of destruction was the “marriage loan” program, designed to encourage marriage and reproduction among racially “fit” people.<sup>35</sup> As part of the Law to Reduce Unemployment, which took effect on June 1, 1933, the regime attempted to “transfer” women out of industry and into “domestic” work.<sup>36</sup> As a complementary initiative, the regime began to offer “marriage loans” to couples if the wife had previously been employed but stopped working upon getting married.<sup>37</sup> The marriage loan program reflected the Nazi emphasis on the institutions of marriage and family as key vehicles for increasing the racially healthy population and achieving racial goals.<sup>38</sup> The program depended on a tax levied upon “single” people—including childless widows and widowers—in order to raise money for unions that might produce children.<sup>39</sup> Additionally, it actively discouraged marriage with someone who suffered from a “hereditary mental or physical ailment” because the marriage would not be “in the interest of the folk-national community.”<sup>40</sup>

Beyond the interests of incentivizing “desirable” procreation, the marriage loan program was equally premised on ideological consistency and racial purity. A supplementary decree to the

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34. KOONZ, *supra* note 13, at 180.

35. Rupp, *supra* note 29, at 371.

36. RGBL. I, 326 (1933).

37. RGBL. I, 326–27 (1933).

38. For an illustration of this, see Hanna Rees, *Frauenarbeit in der NS-Volkswohlfahrt* (1938), reprinted in FRAUEN IM DEUTSCHEN FASCHISMUS 132 (Annette Kuhn ed., 1987) (“Der Nationalsozialismus, der in der Lösung der sozialen Probleme nicht nur die Voraussetzung jedes nationalen Strebens sieht, sondern im Hochziel eines erneuerten Volkes das sozialistische und das nationale Ideal in eines verschmilzt—, musste aus seinem eigenen Gesetz heraus sich allen mütterlichen Kräften verbünden und die natürlichen Lebensträgerinnen und –pflegerinnen zur Mitarbeit verpflichten.”).

39. RGBL. I, 327 § 5 (1933).

40. RGBL. I, 377 § 1 (1933) (“Ehestandsdarlehen werden nicht gewährt: . . . (d) wenn einer der beiden Ehegatten an vererblichen geistigen oder körperlichen Gebrechen leidet, die seine Verheiratung nicht als im Interesse der Volksgemeinschaft liegend erscheinen lassen”). The translation of *Volksgemeinschaft* as “folk-national” is borrowed from Ian Kershaw, who uses it in HITLER, THE GERMANS, AND THE FINAL SOLUTION (2008).

initial program provided that marriage loans were not to be given to those who did not possess citizenship rights, nor to those whose political loyalty was “assumed” to be questionable.<sup>41</sup> The question of political loyalty was “determined through questioning of the applicant himself and in addition of reliable persons who have knowledge of the intimate circumstances of the applicant, such as for example welfare officers, clergy, reliable neighbors.”<sup>42</sup>

The marriage loan program was only one of the ways in which German citizens were not only subject to policing by the state, but also by each other. The Gestapo, the secret police organization responsible for investigating political violations, was leanly staffed and often relied on German citizens to report each other in order to generate leads for an investigation.<sup>43</sup> Additionally, the Gestapo targeted everyday “non-conforming behavior” almost as often as it did forbidden political dissent.<sup>44</sup> By relying on denunciations, the Gestapo cultivated “the widespread fear of being informed on or of being turned in on suspicion of the least deviation.”<sup>45</sup> Indeed, historical analysis shows that not only did citizens inform on each other for various types of sexual “deviations,” including race defilement, but that husbands and wives informed on each other as well.<sup>46</sup>

Even beyond policing by the Gestapo and criminal police, German women’s assimilation into a “vast state-run network” of mothers<sup>47</sup> presented an opportunity for women to indirectly influence each other through the dissemination of propaganda

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41. RGBL I, 377 § 1 (1933) (“Ehestandsdarlehen werden nicht gewährt... wenn nach der politischen Einstellung eines der beiden Ehegatten anzunehmen ist, daß er sich nicht jederzeit rückhaltlos für den nationalen Staat einsetzt”).

42. 2 NAZISM 1919–1945: A DOCUMENTARY READER 262 (J. Noakes & G. Pridham eds., 2003) [hereinafter NAZISM DOCUMENTARY READER].

43. Robert Gellately, *The Gestapo and German Society: Political Denunciation in the Gestapo Case Files*, 60 J. MOD. HIST. 654, 662 (1988) (illustrating that in the Gestapo’s Düsseldorf branch, between 26 and 33 percent of all investigations were instigated by “reports from the population”).

44. ROBERT GELLATELY, *THE GESTAPO AND GERMAN SOCIETY: ENFORCING RACIAL POLICY 1933–1945*, at 47 (1991).

45. Gellately, *supra* note 43 at 661.

46. GELLATELY, *supra* note 44 at 148; VANDANA JOSHI, *GENDER AND POWER IN THE THIRD REICH: FEMALE DENOUNCERS AND THE GESTAPO, 1933–1945*, at 45 (2003).

47. KOONZ, *supra* note 13, at 177.

and through "training mothers" in racial and family policy.<sup>48</sup> The two women's organizations under the Nazis, the NS-Frauenschaft and the Deutsches Frauenwerk, became immensely popular outlets for women to participate in "public life," although that participation was geared entirely toward women's roles as mothers and wives.<sup>49</sup> These organizations typified the manner in which public, political participation by German women was limited to advocacy related to their private sphere, relegated to "areas that kept them far from men's political and economic concerns."<sup>50</sup>

### *B. Race Hygiene and Racial Degeneration*

As a counterpoint to the emphasis on Aryan reproduction, Nazi policy also was preoccupied with eliminating populations that threatened Aryan-racial dominance. The racial policies of the Third Reich had deep roots in Hitler's view of Jews as the primary threat to the German people.<sup>51</sup> The original 25-Point Program of the National Socialist German Workers Party ("NSDAP"), issued in 1920, set out the goals of the creation of a Greater German "Volkish" state and the repudiation of citizenship for those who were not members of the "Volk."<sup>52</sup> Upon taking power in 1933, the NSDAP immediately began to promulgate laws that were based on racial and hereditary distinctions, as the marriage loan example shows. Codified racial discrimination rapidly became a part of the German social and legal

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48. See LISA PINE, NAZI FAMILY POLICY, 1933–1945, at 76 (1997) (describing the "training" carried out by the Reichsmütterdienst).

49. *Id.* at 73 ("By 1941, the aggregate number of members of these two organisations had risen to approximately six million. Out of a total population of some thirty million women over the age of eighteen, that made one woman in every five a member of a National Socialist women's organization in 1941.").

50. KOONZ, *supra* note 13, at 177.

51. On February 27, 1924, Hitler addressed a meeting of over three thousand people to reestablish the National Socialist German Workers Party, which had been banned after an attempted putsch two years before. In his speech, he addressed his "racial comrades" and elucidated the dual threats of "international Jewish financial hegemony" and "Marxism." Adolf Hitler, Speech to a Mass Meeting of the National Socialist German Workers Party, Feb. 27, 1924, in LANDMARK SPEECHES OF NATIONAL SOCIALISM 15, 21 (Randall L. Bytwerk ed., 2008).

52. 25-Punkte-Programm der NSDAP, Deutsches Historisches Museum, <http://www.dhm.de/lemo/html/dokumente/nsdap25/>.

landscape. As Robert Gellately demonstrates, “Everyday life became politicized in Nazi Germany, and, given the racial policy that was a paramount concern, the sphere of sexual and friendly relations came under special scrutiny.”<sup>53</sup>

Since surveilling reproduction was of the utmost importance to preserving the racial state,

[t]he importance of doctors for the regime’s efforts to police intimate spheres of life was recognized very early. Within months of the NSDAP’s rise to power, a law was passed on the prevention of hereditary diseases, which declared that all doctors ‘without regard to professional confidentiality’ had a duty to report pertinent discoveries.<sup>54</sup>

Those who suffered from “hereditary diseases” including blindness, deafness, schizophrenia, or even “severe alcoholism” could be sterilized without their consent.<sup>55</sup> Similarly, midwives were required to report babies born with defects.<sup>56</sup> The infamous euthanasia program, which relied on the participation and support of hundreds of doctors, evolved to keep so-called “criminals” and “degenerates” from procreating.<sup>57</sup>

Responding to the same concern about race “defilement,” the Nuremberg Laws issued in 1935 forbade intermarriage and extramarital relations between Jews and citizens.<sup>58</sup> The first supplementary decree to the Nuremberg laws distinguished between Jews and those of mixed race, or *Mischlinge*, who had one or two Jewish grandparents.<sup>59</sup> The law further distinguished between *Mischlinge* and those who “counted as Jews” (*Geltungsjuden*) despite having only two Jewish grandparents because they were married to a Jew or were the offspring of an extramarital relationship with a Jew.<sup>60</sup> The crime of *Rassenschande*, or “racial shame,” was punishable by imprisonment.<sup>61</sup>

The differentiation between *Geltungsjuden* and *Mischlinge* bespoke an obsession not only with racial purity, but also with

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53. Gellately, *supra* note 43, at 147.

54. *Id.* at 147.

55. RGBL. I 529 (1933).

56. NAZISM DOCUMENTARY READER, *supra* note 42 at 398.

57. *Id.* at 394 (“[C]riminals have the opportunity of procreating, degenerates are raised artificially and with difficulty.”).

58. RGBL. I, 1146–47 (1935).

59. RGBL. I, 1333 (1935).

60. RGBL. I, 1334 § 5 (1935).

61. RGBL. I, 1334 (1935).

the inner workings and regulation of marriage as an institution. *Geltungsjuden* as a category were defined by reference to their marital relationship or that of their parents. Under the racial hierarchy encoded in the Nuremberg laws, *Mischlinge* could marry Germans, while *Geltungsjuden* and Jews could not. Men who committed *Rassenschande* would be punished, while women—whether Jewish or Aryan—were not prosecuted.

The laws on hereditary diseases and intermarriage showed that the NSDAP could regulate the most intimate of relationships. Specifically, enforcement of the Nuremberg laws required deep involvement of the state in policing parenthood, reproduction, and marriage. Indeed, state involvement in sexuality and reproduction was so extensive that some historians have concluded that the Nazi project simply did not recognize “a ‘private’ sphere of sexuality.”<sup>62</sup> Eric Voegelin, in his “Hitler and the Germans” lectures in 1964, characterized this as a truly “totalitarian” system precisely because of its preoccupation with “private” life.<sup>63</sup> But the interests implicated by these intrusions are complex. Part II analyzes the values embedded in the protection of these most intimate relationships.

## II. DIGNITY AND LIBERTY

The right to privacy in European law evolved against this background of intrusive policing of intimate relationships and choices, but scholars have paid scant attention to this history. This Part places the right to privacy in the context of the historical reaction to totalitarian rule and its attendant intrusions on family life. Contemporary accounts of the right to privacy in European law offer two rationales for both its existence and robustness as a legal norm. In one version, European law protects a dignitarian conception of privacy that emanates from nineteenth-century traditions of honor and dueling.<sup>64</sup> Continental privacy law is less preoccupied with protecting against violations carried out by the state than with those carried out by one’s fellow citizens.<sup>65</sup> In the more “conventional” version,

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62. Elizabeth D. Heineman, *Sexuality and Nazism: The Doubly Unspeakable?* 11 J. HIST. SEXUALITY 22, 39 (2002).

63. 31 COLLECTED WORKS OF ERIC VOEGELIN 132 (1999).

64. Whitman, *supra* note 8, at 1166–67.

65. *See id.* at 1182 (“German jurists in and after the 1880s perceived their problem as a problem of honor, to be dealt with through the law of insult, in coordination with the law of artistic property.”).

European privacy law responded to Nazism and its abuse of “state power.”<sup>66</sup> Thus, contemporary European limitations on surveillance and police powers can be attributed to the earlier growth of a police state under Hitler.<sup>67</sup>

However, both of these explanations neglect the types of privacy violations that animated lawmakers in the post-World War II era to enact privacy protections into law. Because of the violations which occurred during the Third Reich, as described above, many of which were particularly oriented toward sex, gender, family, and marriage, privacy was formulated as a human right. A right enshrined in the European Convention on Human Rights (“ECHR”), the German constitution, and a host of other international instruments.<sup>68</sup> In neglecting aspects of privacy that protect reproductive freedom and family life, contemporary scholarship offers a rich yet incomplete view of privacy as a political right.

#### *A. Limitations of the Current Approach*

The scholarship explaining the differences between European and American privacy law encompasses two basic approaches. In an influential account of the divergence between European and American privacy law, James Q. Whitman states that contemporary European privacy law “is the result of a centuries-long, slow-maturing revolt” against “status privilege.”<sup>69</sup> Today, as a consequence of this revolt, everybody is entitled to be treated “in ways that only highly placed and wealthy people were treated a couple of centuries ago.”<sup>70</sup> In Whitman’s account, contemporary European privacy rights are oriented toward “dignity” because they “are all rights to control your public image—rights to guarantee that people see you the way you want to be seen.”<sup>71</sup> Whitman demonstrates that the emergence of a free press in France came hand in hand with concern that

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66. See Francesca Bignami, *European Versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. REV. 609, 687–88 (2007).

67. *Id.*

68. See, e.g., G.A. Res. 217 (III) A, art. 12, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

69. Whitman, *supra* note 8, at 1166.

70. *Id.*

71. *Id.* at 1161.

the press would violate reputational norms by “insulting” citizens and reporting on “the delicacy of private life.”<sup>72</sup> In Germany, the dual roots of Roman insult law and the law of artistic creation gave rise to a tradition of “protecting honor to its fullest extent.”<sup>73</sup> In Whitman’s account, the trajectory of European privacy protections has been generally upward ever since.<sup>74</sup>

Two aspects of Whitman’s account are particularly striking. First, Whitman cites exclusively private law cases, usually tort actions to enjoin publication or to recover damages after the publication of embarrassing material. However, at least in the Weimar Republic, there did exist a *constitutional* right of privacy in one’s home<sup>75</sup> and correspondence.<sup>76</sup> Second, while many, if not most, of the early privacy cases that Whitman cites discuss sexual conduct or nudity, in these cases, it is striking that the subjects—women—are not ordinarily defending their own privacy rights; rather, their husbands or paramours stand up to vindicate their *masculine* honor in court.<sup>77</sup> Two of Whitman’s examples show this to be the case in France in particular. Alexander Dumas sued to vindicate his right to privacy when pictures appeared of his girlfriend in her underwear; the

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72. Thus, in 1833, reports that the widowed Duchess of Berry was pregnant resulted in multiple duels in order to defend the honor of “private life.” *Id.* at 1172, 1174.

73. *Id.* at 1185.

74. Whitman’s account has been widely discussed. *See, e.g.,* Alenka Kuhelj, *The Twilight Zone of Privacy for Passengers on International Flights Between the EU and USA*, 16 U.C. DAVIS J. INT’L L. & POL’Y 383, 409–10 (2010) (attributing differences in privacy law to “cultural values”) (citing Whitman); M. James Daly, *Information Age Catch 22: The Challenge of Technology to Cross-Border Disclosure & Data Privacy*, 12 SEDONA CONF. J. 121, 128 (2011) (attributing differences to “contrasting political and social ideals”) (citing Whitman); Jake Spratt, *An Economic Argument for Electronic Privacy*, 6 I/S: J. L. & POL’Y FOR INFO. SOC’Y 513, 519–20 (2011) (attributing differences to “cultural differences”) (citing Whitman).

75. *Verfassung des Deutschen Reichs [VdDR]* [Constitution of the German Reich] Aug. 11, 1919, art. 115.

76. *Id.* art. 117.

77. In particular, Whitman’s discussion of early French privacy cases centers on several incidents in which men sue to vindicate their privacy rights in their paramours’ images. Whitman, *supra* note 8, at 1175–77. While his discussion of early German privacy law focuses more on statutes and less on implementation by the courts, Whitman also argues that German privacy law stems from the Roman law of insult, which “came to protect respectable women against lewd comments.” *Id.* at 1183.

Court sided with him on the basis of “good morals.”<sup>78</sup> In 1868, a husband successfully defended his privacy right to his wife’s nude image; the court cited “the inviolability of the domestic hearth.”<sup>79</sup> The courts adjudicating early privacy rights sided with “honor” over publicity in large part because it would have been dishonorable to have one’s wife leave the private sphere and appear in public—nude, no less.

The second, more “conventional” approach to conceptualizing European privacy law explains that privacy rights protect against intrusions by the state and respond to a legacy of the misuse of personal information by totalitarian regimes. In Francesca Bignami’s account of the divergence between Continental and American data privacy law, she argues that the experience of a police state under Nazi Germany is at the root of contemporary European data privacy law.<sup>80</sup> Invoking the German attempt to conscript Norwegian men using Norwegian government files that aggregated population data, Bignami argues that the misuse of personal *records* is the “object of European privacy law.”<sup>81</sup> The Nazis’ use of personal records to target Jews, Communists, and other undesirable groups is widely seen as the root of European privacy law.<sup>82</sup> Legal scholars conjuring the specter of totalitarian “police states” often similarly

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78. *Id.* at 1176.

79. *Id.* at 1175–77.

80. Bignami, *supra* note 66, at 609–10.

81. *Id.* at 610.

82. Daniel E. Newman, *European Union and United States Personal Information Privacy, and Human Rights Philosophy—Is There a Match?* 22 TEMP. INT’L & COMP. L.J. 307, 328 (2008) (“Concern over personal privacy, particularly regarding personal data privacy, in the European Union has a long history, due to the Nazis and fascists scouring family records and other personal documents to target individuals in the 1930s and 1940s.”); Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 35 VAND. J. TRANSNAT’L L. 655, 666 (2002) (“The European emphasis on personal privacy rights may be attributable in part to Third Reich abuses in tracking its target groups with invasive data-collection methods.”); Arthur Rizer, *Dog Fight: Did the International Battle Over Airline Passenger Name Records Enable the Christmas-Day Bomber?*, 60 CATH. U. L. REV. 77, 81 (2010) (“[T]his fundamental difference in attitude between Europeans and Americans was rooted in the use of death lists and domestic spying both in Nazi Germany and in Soviet-ruled Eastern Europe.”).



call upon the danger of allowing centralized governments to know too much information about a person.<sup>83</sup>

This view too, is incomplete, as it neglects interests in family and "private" life and focuses exclusively on information privacy.<sup>84</sup> As privacy scholar Julie Inness has argued, however, the concept of "privacy" embraces at least three core responsibilities: information, access, and intimate decision making.<sup>85</sup> In American as well as European law, privacy rights play a role in adjudicating disputes surrounding contraception, abortion, marriage, and labor. It is true that the development of new technology has pushed concerns about surveillance by commercial and government entities to the forefront. As Daniel Solove writes, "Today, the predominant mode of spreading information is not through the flutter of gossiping tongues but through the language of electricity, where information pulses between massive record systems and databases."<sup>86</sup> But conflating data protection law with the "right to privacy" raises more questions than it answers about the principles from which these legal protections emerged. Comprehensive data protection law in Europe did not emerge until the 1980s, when the risks of computerized information collection, aggregation, and dissemination became much clearer. But the privacy protections embedded in the ECHR predate questions about data protection by almost twenty years.<sup>87</sup> Indeed, if the argument is that privacy

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83. See, e.g. DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 182 (2004) ("The government can use dossiers of personal information in mass roundups of distrusted or suspicious individuals whenever the political climate is ripe."); Aaron M. Clemens, *The Pending Reinvigoration of Boyd: Personal Papers are Protected by the Privilege Against Self-Incrimination*, 25 N. ILL. U. L. REV. 75, 122 (2004) ("The lessons learned from the totalitarian regimes in the former Soviet Union and Nazi Germany should deter America from going down the path of ubiquitous surveillance coupled with untrammelled governmental authority.").

84. INFORMATION PRIVACY LAW 1 (Daniel J. Solove and Paul M. Schwartz, eds. 2011) ("Information privacy is often contrasted with 'decisional privacy,' which concerns the freedom to make decisions about one's body and family.")

85. Julie Inness, *Information, Access, or Intimate Decisions About One's Actions? The Content of Privacy*, 5 PUB. AFF. Q. 227, 227 (1991).

86. SOLOVE, *supra* note 83, at 2.

87. The Parliamentary Assembly of the Council of Europe asked the Committee of Ministers to assess the adequacy of Article 8 to protect personal data in 1968. In 1981, the Council of Europe passed the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, by which point some states had already passed data protection legisla-

law reflected concerns about abuse by Nazis and fascists, the framers of the ECHR had a much fresher memory of those abuses in 1949 than did the drafters of data protection laws in the 1970s and 1980s.

Finally, most of the scholarship does not define either “dignity” or “liberty,” despite relying on these concepts to draw a distinction between the European and American traditions.<sup>88</sup> In the privacy literature, the term “liberty” connotes additional political protections to those that are encompassed by the term “dignity,”<sup>89</sup> but “dignity” itself has been cited as a *source* of rights (as well as a freestanding right), especially in the human rights space.<sup>90</sup> In short, these concepts are overlapping, complex, and used by legal scholars in unclear ways.

Every definition of human dignity relies on the ability to think, speak, and act with autonomy. Immanuel Kant’s concept of dignity as a form of “intrinsic worth”—and the characteristic that prevents humankind from being considered from means rather than ends in themselves<sup>91</sup>—was hugely influential on the German constitution-drafting process after World War II as well as on the development of human rights.<sup>92</sup> As Rhoda Howard and Jack Donnelly argue, “[h]uman rights are a particular

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tion. See JACQUELINE KLOSEK, DATA PRIVACY IN THE INFORMATION AGE 13 (2000).

88. Neither Whitman nor Bignami offer a cohesive concept of dignity as opposed to liberty.

89. See Whitman, *supra* note 8, at 1161 (defining the American concept of privacy as “the right to freedom from intrusions by the state, especially in one’s own home”).

90. Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 853 (1983).

91. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 38 (Abbott trans., 1785).

92. Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, in UNDERSTANDING HUMAN DIGNITY 7 (Christopher McCrudden ed., 2013) (summarizing controversy about role of Kant in constitutional framing); see also EDWARD J. EBERLE, DIGNITY & LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 7 (2002) (“[T]he founders of the Federal Republic drew deep upon German tradition to found the legal order on moral and rational idealism, particularly that of Kant and Hegel.”); DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 361–62 (3d ed. 2012). (“In seeking to advance human dignity as a constitutional value, both court and commentators have relied on three politically significant sources of ethical theory in postwar Germany—Christian natural law, Kantianism, and social democratic thought.”).

social practice that aims to realize a distinctive substantive conception of human dignity.”<sup>93</sup> That substantive conception rests on “values of equality and autonomy.”<sup>94</sup> Contemporary theoreticians routinely invoke autonomy as the underpinning of dignity. Jeremy Waldron offers a definition of dignity that is foremost “predicated on the fact that she is recognized as having the ability to *control* and *regulate* her actions in accordance with her own apprehension of norms and reasons that apply to her.”<sup>95</sup>

But autonomy undergirds notions of liberty as much as it does dignity. As J.S. Mill conceived of it, the “appropriate region of human liberty” included not only the liberty of “thought and feeling,” but also, and more controversially, “liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them.”<sup>96</sup> Isaiah Berlin’s concept of “positive liberty” itself resembles human rights-type concepts of human dignity:

I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer — deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realising them.<sup>97</sup>

As Berlin conceives of it, this concept of liberty places a higher safeguard on political power than does the “negative” concept of

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93. Rhoda E. Howard & Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*, 80 AM. POL. SCI. REV. 802 (1986).

94. *Id.* at 802.

95. Jeremy Waldron, *How Law Protects Dignity* 2–3 (N.Y.U. School of Law Pub. Law & Legal Theory Res. Paper Series, Working Paper No. 11-83, 2011) (emphasis added), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1973341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973341).

96. J.S. MILL, ON LIBERTY 22 (1901).

97. Isaiah Berlin, *Two Concepts of Liberty*, in LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 178 (Henry Hardy & Ian Harris eds., 2002).

liberty that leaves only a space for self-determination, for “[i]f the tyrant (or ‘hidden persuader’) manages to condition his subjects (or customers) into losing their original wishes and embracing (‘internalising’) the form of life he has invented for them, he will, on this definition, have succeeded in liberating them.”<sup>98</sup> Yet Berlin’s conception of “positive liberty” is not terribly distinct from Waldron’s concept of dignity, which also emphasizes the importance of self-determination and control.<sup>99</sup>

This brief philosophical tour illustrates that the terms “dignity” and “liberty” come packed with meaning, but it is not at all clear what purpose they serve in privacy scholarship. Perhaps we should assume that a dignity-oriented approach to privacy protects privacy in light of societal expectations, while a liberty-oriented approach protects autonomous choice free of state interference.<sup>100</sup> As the next section shows, the privacy protections in place in the ECHR seem not to reflect concerns about informational privacy as much as about privacy regarding family, sex, and marriage—concerns that seem more appropriately categorized as “intimate decision making.”<sup>101</sup> Importantly, the area of family, reproduction, and marriage is one in which the interests in dignity and liberty, so defined, may collapse to some extent. A woman’s dignity interest in bodily privacy is inextricably linked to her liberty interest in nonintervention by the state in reproduction. A man’s dignity interest in his “private sphere” is closely related to his liberty interest in choosing the way in which his children are educated and raised.<sup>102</sup> In other words, the notion that privacy is oriented toward “dignity” simply because it happens to protect the way one is perceived by the outer world fails to account for the many diverse interests that privacy defends.

### *B. Privacy as Human Right*

Given widespread disagreement about the content of the privacy right, it is all the more striking that European laws give

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98. *Id.* at 186.

99. Waldron, *supra* note 95, at 4 (discussing legal protections for “dignity” as “connected to the idea that humans are capable of self-control”).

100. Robert Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092–93 (2001).

101. Inness, *supra* note 85, at 227.

102. See discussion *infra* pp. 21–23.

such affirmative protection to the right. Article 8 of the European Convention on Human Rights provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>103</sup>

In contrast with the law of the United States, where the right to privacy is not written into the Constitution's text, the inclusion of privacy as a *human* right is striking. The ECHR is a supranational instrument and, in many European regimes, has a higher status than domestic law.<sup>104</sup> Many, though not all, European constitutions recognize rights to privacy in their enumeration of civil liberties.<sup>105</sup> Even those that do not are bound to respect Article 8, if they have ratified the Convention.

At first glance, the inclusion of privacy rights in international-human rights regimes is consonant with Whitman's conclusion that European privacy norms are geared toward protecting dignity, because the purpose of human rights instruments in general is to secure human dignity.<sup>106</sup> Thus, the first "human rights instrument"—the U.N. Charter—purports "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and

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103. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter "European Convention on Human Rights" or "ECHR"].

104. See Alec Stone Sweet & Helen Keller, *Assessing the Impact of the ECHR on National Legal Systems*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 683 (Alec Stone Sweet ed., 2008) (arguing that the ECHR is most effective in strongly monist states).

105. See, e.g., GRUNDGESETZ [GG] [BASIC LAW] May 23, 1949, BGBl. I, art. 10 (Ger.) (privacy of correspondence, mail, and telecommunications); KONSTYTUCJA [CONSTITUTION] Oct. 17, 1997, art. 49 (Pol.) (same); 1994 CONST. art. 22 (Belg.) (privacy and family life); BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 13 (Switz.) (privacy and family life); but see 1958 CONST. (Fr.) (no provision for privacy).

106. See, e.g., SABINE C. CAREY, MARK GIBNEY & STEVEN C. POE, *THE POLITICS OF HUMAN RIGHTS: THE QUEST FOR DIGNITY* (2010).

of nations large and small.”<sup>107</sup> The Universal Declaration of Human Rights is similarly premised on the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.”<sup>108</sup> While human rights might not be a necessary step to securing human dignity,<sup>109</sup> a “natural rights” conception of human dignity is certainly the moral and theoretical underpinning to human rights.<sup>110</sup> Facially, it seems plausible that the inclusion of “privacy” in international human rights instruments can be best understood as an outgrowth of the sort of “dignity” interest that human rights are intended to protect. At the same time, it is evident that human rights regimes unfolded in large part in response to the atrocities of the Second World War and of the Holocaust.<sup>111</sup>

### 1. Legislative History of the European Convention on Human Rights

In 1949, speaking in front of the Consultative Assembly of the Council of Europe, Pierre-Henri Teitgen said,

Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove the levers of control.... It is necessary to intervene before it is too late. A conscience must exist somewhere which will sound the alarm to the minds of a nation, menaced by this progressive corruption, to war[n] them of the peril and to show them that they are progressing down a long road which leads far, sometimes even to Buchenwald or Dachau.<sup>112</sup>

Indeed, as Andrew Moravcsik demonstrates, the ECHR enjoyed particular support from national governments that were new to

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107. U.N. Charter pmbl.

108. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

109. See Jack E. Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 75 AM. POL. SCI. REV. 302 (1982).

110. See Johannes Morsink, *The Philosophy of the Universal Declaration*, 6 HUM. RTS. Q. 309 (1984).

111. See INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 16–17 (Jeffrey L. Dunoff, Steven R. Ratner, & David Wippman, eds., 2d ed. 2006) (describing World War II as the “catalyst” for development of human rights law, new limitations on the use of force, and international criminal law).

112. ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* ch. 1 (2010).

democracy because "human rights norms are expressions of the self-interest of democratic governments in 'locking in' democratic rule through the enforcement of human rights."<sup>113</sup> Enforceable human rights did not evolve purely in reaction to substantive violations by totalitarian dictatorships that reconstituted states' values;<sup>114</sup> rather, Moravcsik argues that states' calculations were highly *institutional*: "By far the most consistent public justification for the ECHR . . . was that it might help combat domestic threats from the totalitarian right and left, thereby stabilizing domestic democracy and preventing international aggression."<sup>115</sup> Nascent democracies had an interest in consolidating democratic institutions in such a way that they would be able to resist later threats to democratic rule.<sup>116</sup>

The ECHR was modeled largely on the Universal Declaration of Human Rights ("UDHR"), which had been adopted as a non-binding framework for human rights the year before.<sup>117</sup> Surprisingly, although the UDHR was framed as a response to World War II, the Commission did not grapple extensively with the legacy of the Holocaust.<sup>118</sup> As Mary Ann Glendon puts it, "There was relatively little discussion of Nazi atrocities in the Human Rights Commission, probably because the members saw the business of punishing war criminals as belonging to the law of war (the Nuremberg Principles and the Genocide Convention) and regarded their own task as setting conditions for peace."<sup>119</sup>

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113. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Post-War Europe*, 54 INT'L ORG. 217, 228 (2000).

114. For this idea, Moravcsik cites Martha Finnemore & Katherine Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998); Thomas Risse-Kappen, *Collective Identity in a Democratic Community: The Case of NATO*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter Katzenstein, ed., 1996); and Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599 (1986).

115. Moravcsik, *supra* note 113, at 237.

116. *Id.*

117. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

118. MARY ANN GLENDON, *WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 189 (2001).

119. *Id.* According to Glendon, the one major exception was in the discussion surrounding Article 26 on education, where the representatives preserved parents' rights to determine the form of their children's education against the background of Nazi indoctrination.

The first draft of the “International Bill of Rights” was written primarily by John E. Humphrey, a Canadian international law expert who served on the three-member drafting committee that convened in spring 1947.<sup>120</sup> The privacy provision in that first draft read:

No one shall be subjected to arbitrary searches or seizures, or to unreasonable interference with his person, home, family relations, reputation, privacy, activities, or personal property. The secrecy of correspondence shall be respected.<sup>121</sup>

In considering the draft, every representative agreed that the provision had a place in the declaration, although there was uncertainty as to the form it should take.<sup>122</sup> One representative, from Chile, suggested that the “inviolability of property and correspondence” should be separate from the provision that protected family relations.<sup>123</sup> By the next session of the Commission in December, the language had changed and subsequently read, “The privacy of the home and of correspondence and respect for reputation shall be protected by law.”<sup>124</sup> In the form in which it was finally adopted, the UDHR read:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.<sup>125</sup>

In framing the ECHR, the Consultative Assembly explicitly relied on the language in place in the UDHR, but it considered totalitarian abuses much more openly than had the Human Rights Commission.<sup>126</sup> This is consonant with Moravcsik’s ar-

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120. *Id.* at 47–48.

121. U.N. Econ. & Soc. Council, Draft Outline of International Bill of Rights, art. 11, Comm’n on Human Rights Drafting Comm., U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947).

122. U.N. Econ. & Soc. Council, Summary Record of the Fourth Meeting, at 5–6, Comm’n on Human Rights Drafting Comm., U.N. Doc. E/CN.4/AC.1/SR.4 (June 13, 1947).

123. *Id.* at 6.

124. U.N. Econ. & Soc. Council, Parallel Passages in Human Rights Drafting Committee Text and United States Proposal, at 4, Comm’n on Human Rights, U.N. Doc. E/CN.4/36/Add.2 (Dec. 5, 1947).

125. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12 (Dec. 10, 1948).

126. This is perhaps unsurprising, given that representatives of the Soviet Union as well as Czechoslovakia and Belarus were involved in the drafting of



gument that the ECHR served to "lock in" domestic democratic policy through a formal international mechanism.<sup>127</sup> But it was not only the case that nations chose to support binding and effective human rights mechanisms because they desired the external support against totalitarianism.<sup>128</sup> It is also true that the negotiators of the ECHR considered the substantive rights in the Convention to be safeguards against undemocratic abuse. This was the case with regard to political rights such as the right to a fair trial<sup>129</sup> and the right to free thought.<sup>130</sup>

Even more so, the Committee overtly grounded the Convention's privacy protections in an opposition to totalitarian abuses. The first draft of the Convention, submitted by the "European Movement," had no explicit "privacy" provision but two separate provisions for "the natural rights deriving from marriage and paternity and those pertaining to the family" and "the sanctity of the home."<sup>131</sup> At the first session of the Consultative Assembly, Pierre-Henri Teitgen, the Committee's rapporteur, summoned the "scourges of the modern world"—"Fascism, Hitlerism, Communism"—as a reason that human

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the UDHR. Moreover, the UDHR was a non-binding instrument, whereas the ECHR would bind the states' parties.

127. Moravcsik, *supra* note 113, at 220.

128. *Id.* at 231 (using compulsory jurisdiction and the right of individual petition as a proxy to measure the degree of support for a binding regime).

129. For example, the British delegation to the Assembly clarified the ECHR's proposed inclusion on trial rights, arguing that the only way that the European Court could take jurisdiction would be if "the national court was prevented from giving a judgment which would really be the satisfactory judgment of a court" because it "had been forced to put into effect arbitrary and undemocratic laws." COUNCIL OF EUROPE, EUR. COMM'N OF HUMAN RIGHTS, PREPARATORY WORK ON ARTICLE 6 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 7-8 (1956), [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART6-DH\(56\)11-EN1338886.PDF](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART6-DH(56)11-EN1338886.PDF).

130. In the report accompanying its draft, the Committee on Legal and Administrative Questions explained that it recommended a general "freedom of thought" provision in part to protect against "those abominable 'methods of police enquiry or judicial process which rob the suspected or accused person of control of his intellectual faculties and of his conscience.'" COUNCIL OF EUROPE, EUR. COMM'N OF HUMAN RIGHTS, PREPARATORY WORK ON ARTICLE 9 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 3-4 (1956), [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART9-DH\(56\)14-EN1338892.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART9-DH(56)14-EN1338892.pdf).

131. COUNCIL OF EUROPE, 1 COLLECTED EDITION OF THE TRAVAUX PREPARATOIRES 296 (1975) [hereinafter TRAVAUX PREPARATOIRES]

rights were necessary.<sup>132</sup> However, there had been some disagreement within the committee about whether the “family rights” provisions ought to be included in the Convention because they were not “essential for the functioning of democratic institutions.”<sup>133</sup> Most of the committee, however, “thought that the racial restrictions on the right of marriage made by the totalitarian regimes, as also the forced regimentation of children and young persons organised by these regimes, should be absolutely prohibited.”<sup>134</sup> At the first session of the Assembly, Teitgen clarified the disagreement:

No one in the Committee . . . has denied the vital importance of these family rights. . . . The Committee recalled the time in the recent past when, in some countries, certain people were denied the right to marry on account of race or religious convictions. It also recalled the legislation, under which some countries suffered during cruel years, which subordinated the child to the benefit of the State. . . . It considered that the father of a family cannot be an independent citizen, cannot feel free within his own country, if he is menaced in his own home and if, every day, the State steals from him his soul, or the conscience of his children.<sup>135</sup>

Teitgen also clarified that the right to marry did not additionally require states to guarantee “equal rights during marriage,” as the UDHR seemed to.<sup>136</sup> Thus, the ECHR’s provision on “private life” was more protective of privacy than the UDHR’s because it minimized intrusions into the family unit and the spousal relationship.

## 2. Legislative History of the Basic Law

The 1949 Basic Law is a product of similar cultural and political “milieu” as the 1950 ECHR.<sup>137</sup> Like the ECHR and other human rights instruments, the Basic Law foregrounds dignity as the “driving principle” of constitutional law.<sup>138</sup> The Basic Law’s concept of dignity reflects “Christian natural law, Kantian moral philosophy, and more individualistic, or existential,

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132. *Id.* at 40.

133. TRAVAUX PRÉPARATOIRES, *supra* note 131, at 3–4.

134. *Id.*

135. *Id.* at 270.

136. *Id.* at 268.

137. EBERLE, *supra* note 92, at 22.

138. *Id.* at 50.

theories of personal autonomy and self-determination.”<sup>139</sup> One commentator on the German constitution drafting process notes that different forms of expressing the concept of dignity were considered, including the sentence: “The state is there for the sake of the people, not the people for the sake of the state.”<sup>140</sup> The point of the Article, as the sentence hints, is to serve as a “counterpoint” to the ideology of National Socialism.<sup>141</sup> Indeed, the inclusion of citizens’ basic rights as the first section of the Basic Law was also meant to mark the turn away from National Socialism and its disregard for basic liberties.<sup>142</sup> Nonetheless, the drafters of the Basic Law referred less to Germany’s recent totalitarian past than did the drafters of the UDHR or ECHR. This can be attributed at least in part to the slow process of grappling with the past that Germany went through after the war.<sup>143</sup>

German privacy rights are rooted in Article 2 of the Basic Law, which guarantees the “free development of personality”:

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.<sup>144</sup>

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139. *Id.* at 42–43.

140. INGO VON MÜNCH & PHILIP KUNIG, GRUNDGESETZ-KOMMENTAR 69 ¶ 6 (5th ed. 2003) (“Das sollte den beabsichtigten Kontrapunkt zur Ideologie des Nationalsozialismus... besonders deutlich markieren... Auch die schließlich gewählte Formulierung bedeutet eine unmißverständliche Absage an den Totalitarismus al seiner Konzeption vom Staate , der die Herabwürdigung des einzelnen gleichsam immanent ist . . . , zwar nicht sein Ziel, aber das—wie alle Erfahrung lehrt—von ihm bewirkte Ergebnis.”).

141. *Id.*

142. *Id.* at 22 ¶ 5 (“Mit der Hervorhebung der Grundrechte durch ihre Platzierung im 1. Abschnitt des GG wird die Abkehr von der NS-Zeit deutlich gemacht, also von einem grundrechtslosen Abschnitt in der langen Geschichte der Grundrechte.”).

143. See Wulf Kansteiner, *Losing the War, Winning the Memory Battle: The Legacy of Nazism, World War II, and the Holocaust in the Federal Republic of Germany*, in *THE POLITICS OF MEMORY IN POST-WAR EUROPE* 102 (Richard Ned Lebow, Wulf Kansteiner & Claudio Fogu eds., 2006).

144. GRUNDGESETZ [GG] [BASIC LAW] May 23, 1949, BGBl. I, art. 2 (Ger.).

Other provisions of the Basic Law also touch on privacy, but constitutional privacy jurisprudence centers on the “personality right” guaranteed by Article 2.<sup>145</sup> One commentator traces the roots of the personality right to the “path breaking concretization of human dignity.”<sup>146</sup>

The original draft of the Basic Law’s guarantee of personality rights that emerged from the Herrenchiemsee conference actually deeply emphasized individual liberty. The original draft of Article 2 read:

(1) All people are free.

(2) Each person has the freedom, within the constraints of the legal order and good sense, to do anything that does not harm others.<sup>147</sup>

However, when the Parliamentary Council met to draft the Basic Law, the drafters thought that the language wasn’t specific enough and worried that although freedom needed to be limited to the legal order, the restriction was too open to interpretation.<sup>148</sup> Other provisions of the draft that were meant to protect privacy actually mirrored the Weimar constitution. The Herrenchiemsee draft article on the inviolability of the home, for example, read, “Everyone’s home is his sanctuary and inviolable. Searches and seizures of living spaces are permitted only in the situations and forms prescribed by the law.”<sup>149</sup> The 1919 Weimar Constitution had read, in comparison, “Every German’s home is his sanctuary and inviolable. Exceptions may

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145. GRUNDGESETZ [GG] [BASIC LAW] May 23, 1949, BGBL. I, art. 10 (Ger.) (providing for the privacy of “correspondence, posts and telecommunications”).

146. THEODOR MAUNZ, GRUNDGESETZ: KOMMENTAR 14 (8th ed. 2012) (“Das Recht auf freie Entfaltung der Persönlichkeit ist von ihrem grundsätzlichen Gehalt her die wegweisende Konkretisierung der Menschenwürde.”).

147. 1 JAHRBUCH ÖFFENTLICHEN RECHTS 54 (1951) (“(1) Alle Menschen sind frei. (2) Jedermann hat die Freiheit, innerhalb der Schranken der Rechtsordnung und der guten Sitten alles zu tun, was anderen nicht schadet.”).

148. *Id.*

149. Entwurf zu einem Grundgesetz für einen Bund deutscher Länder (Herrenchiemseer Entwurf) [Draft Constitution for a Federation of German States] art. 5 (1948) (Ger.), available at <http://www.verfassungen.de/de/de49/chiemseerentwurf48.htm>.

only be made as provided by law.”<sup>150</sup> As ratified, the provision for the inviolability of the home encompasses seven sections and was held out in contrast to the “masterpiece of brevity” anticipated by the Herrenchiemsee draft.<sup>151</sup> The provision on privacy of correspondence, mail, and telecommunications remained almost unchanged from Weimar onward.<sup>152</sup>

### III. BRIDGING THE DIVIDE

The “exceptional” story of the foundation of European privacy law is frequently trotted out to explain why Europeans and Americans just can’t see eye-to-eye on issues of privacy protection. Indeed, contemporary policy-makers and scholars have embraced the view that the two legal traditions of privacy are irreconcilable. Last year, Barry Steinhardt, the chairman of Friends of Privacy, called the divergence a “titanic clash.”<sup>153</sup> Commentators have analyzed the differences between U.S. and

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150. VERFASSUNG DES DEUTSCHEN REICHS [VDDR] [CONSTITUTION OF GERMAN REICH] Aug. 11, 1919, art. 115 (Ger.).

151. GRUNDGESETZ [GG] [BASIC LAW] May 23, 1949, BGBl. I, art. 13 (Ger.); see Wolfgang Schäuble, Federal Minister of the Interior, *The Herrenchiemsee Constitutional Convention 60 Years On* (July 20, 2008), [http://www.bmi.bund.de/SharedDocs/Reden/EN/2008/07/bm\\_herrenchiemsee\\_en.html](http://www.bmi.bund.de/SharedDocs/Reden/EN/2008/07/bm_herrenchiemsee_en.html).

152. Compare VERFASSUNG DES DEUTSCHEN REICHS [VDDR] [CONSTITUTION OF GERMAN REICH] Aug. 11, 1919, art. 117 (Ger.) (“The secrecy of letters and all postal, telegraphic and telephone communications is inviolable. Exceptions are inadmissible except by Reich law.”) with Entwurf zu einem Grundgesetz für einen Bund deutscher Länder (Herrenchiemseer Entwurf) [Draft Constitution for a Federation of German States] art. 11 (1948) (Ger.), available at <http://www.verfassungen.de/de/de49/chiemseerentwurf48.htm> (“(1) The secrecy of letters, post, and telecommunications is inviolable. (2) Exceptions may only be made by judicial process in the situations and forms prescribed by the law.”) and GRUNDGESETZ [GG] [BASIC LAW] May 23, 1949, BGBl. I, art. 10 (Ger.) (“(1) The privacy of letters and all postal and telecommunications is inviolable. (2) Restrictions may only be ordered in accordance with a law.”). As ratified, Article 10 also provided that if the restriction “serves to protect the free democratic basic order,” the subject of the violation need not be informed. This corresponded with Article 18, which provided that those who abused certain basic rights would be considered to have forfeited them. This provision is known as a form of “militant democracy.” See KOMMERS & MILLER, *supra* note 92, at 286.

153. Kevin J. O'Brien, *Silicon Valley Companies Lobbying Against Europe's Privacy Proposals*, N.Y. TIMES, Jan. 25, 2013, <https://www.nytimes.com/2013/01/26/technology/eu-privacy-proposal-lays-bare-differences-with-us.html>.

EU “approaches to personal privacy” as the root of divergences about the proper role of industry self-regulation and the “right to be forgotten.”<sup>154</sup> Although diplomats have attempted to reconcile the two traditions, recognizing that this could lead to less conflict and more legal certainty for many actors,<sup>155</sup> they also continue to embrace a narrative that European privacy law emerged from a wholly different tradition than did U.S. privacy law.<sup>156</sup>

Despite the gendered sources of privacy law, privacy scholars and policy-makers largely ignore sex, gender, and family. While many have recognized the uneasy balance between privacy as protection and privacy as oppression when it comes to women’s interests,<sup>157</sup> most have simply ignored the gender-based roots of contemporary privacy, focusing instead on information privacy. Tellingly, the evolution of privacy as a human right, with its particularly gendered history, parallels the evolution of the privacy right in American jurisprudence, which also, in its early days, largely focused on privacy within the home and family.<sup>158</sup> Yet in areas of transatlantic cooperation—or, perhaps

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154. Scott Bradner, *Europe Cares about Privacy, So You Must Too*, NETWORK WORLD (Feb. 7, 2012, 2:55 PM), <http://www.networkworld.com/article/2185609/security/europe-cares-about-privacy—so-you-must-too.html>.

155. See, e.g., William E. Kennard, U.S. Ambassador to the EU, Remarks at Forum Europe’s 3rd Annual European Data Protection and Privacy Conference (Dec. 4, 2012), [http://useu.usmission.gov/kennard\\_120412.html](http://useu.usmission.gov/kennard_120412.html) (stressing “shared values and commitments” between Europe and the United States); see also Cameron Kerry, U.S. Dep’t of Commerce General Counsel, CFK Keynote Address at the Second Annual European Data Protection and Privacy Conference On Transatlantic Solutions for Data Privacy (Dec. 6, 2011), [http://useu.usmission.gov/kerry\\_120611.html](http://useu.usmission.gov/kerry_120611.html) (“[W]e share the common goal of protecting private information while also facilitating innovation.”).

156. See, e.g., Kennard, *supra* note 155 (“The United States was founded on—and its modern-day laws, regulations and practices reflect this—a core belief in the importance of protecting citizens from government intrusion.”); Omar Tene, *Privacy in Europe and the United States: I Know It When I See It*, CTR. FOR DEMOCRACY AND TECH. (June 27, 2011), <https://cdt.org/blog/privacy-in-europe-and-the-united-states-i-know-it-when-i-see-it/> (quoting Whitman extensively for the proposition that “when it comes to privacy, the cross-Atlantic harmony breaks down”).

157. See generally, ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988); Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175 (2000).

158. See, e.g., *De May v. Roberts*, 9 N.W. 146, 148–49 (Mich. 1881) (holding that, where physician had brought an “unprofessional young married man

more accurately, competition—over privacy law and policy, the narrative is one of simple legal and political difference.

Although contemporary privacy concerns largely center on new technology and surveillance by public and private actors, it is far from true that this type of concern is gender neutral. On the contrary, concerns about keeping information about sex, gender, and family private animate much of the public debate about privacy in the United States as well as in Europe. This Part examines three areas of policy clashes between the United States and Europe regarding privacy.

### *A. Business Practices Regarding Online User Privacy*

An appreciation of the common roots of privacy rights across the Atlantic can help harmonize the law applicable to businesses that serve European and U.S. customers, and confront difficult conflicting obligations regarding user privacy in the two regimes.<sup>159</sup> User data in the European Union is protected by comprehensive statute as well as the European Convention.<sup>160</sup> By contrast, user data in the United States is protected by sectoral legislation in some areas but not in others.<sup>161</sup> Alt-

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with him” to witness plaintiff’s labor and childbirth, plaintiff’s “legal right to privacy” was violated). *De May* is, by many accounts, the first illustration of the “right to privacy” in American jurisprudence. See GARRET KEIZER, *PRIVACY*, 69–70 (2012); Caroline Danielson, *The Gender of Privacy and the Embodied Self: Examining the Origins of the Right to Privacy in U.S. Law*, 25 FEMINIST STUD. 311, 311–13 (1999) (“*De May v. Roberts* . . . is the earliest case in the United States explicitly to name a right to privacy.”) (citations omitted).

159. See, e.g., Viviane Reding, Vice-President of the European Comm’n, Speech at the 2nd Annual European Data Protection and Privacy Conference (Dec. 6, 2011), [http://europa.eu/rapid/press-release\\_SPEECH-11-851\\_en.htm?locale=FR](http://europa.eu/rapid/press-release_SPEECH-11-851_en.htm?locale=FR) (“[T]his is a globalised world and we are also counting on others to take data protection seriously. . . . However, I have been told that only voluntary codes of conduct based on multi-stakeholder consultations are envisaged [in the United States].”); Kerry, *supra* note 155 (“[A]lthough governments may take different approaches to privacy protection, it is critical to the continued growth of the digital economy that they strive to create interoperability between privacy regimes that often are fundamentally similar.”).

160. See Council Directive 95/46/EC, 1995 O.J. (L281) 31 (laying out comprehensive protection and obligations for subjects, data controllers, and data processors).

161. See, e.g., Driver’s Privacy Protection Act, 18 U.S.C. § 2721 (1994) (protecting confidential driver records); Right to Financial Privacy Act, 12 U.S.C. §§ 3401–342 (1978) (protecting confidential financial records); Family Educa-

though European privacy law is palpably different from U.S. privacy law, American firms that do business in Europe must comply with European law. Differing responsibilities under the two regimes increase costs and make compliance more difficult. U.S.-based companies have faced fines by European privacy regulators for activities that violate European law but would be entirely appropriate under U.S. law. For instance, in April, 2013, German data protection authorities fined Google for “illegally collecting personal online data from unencrypted Wi-Fi networks” in connection with its Street View product.<sup>162</sup> Google is additionally under investigation by six national data protection authorities for violations of European law in connection with its decision to share user information across all of its services.<sup>163</sup>

One area of conflict in the commercial realm is e-discovery, where discovery requirements for litigation in U.S. courts often conflict with European privacy rules.<sup>164</sup> The Federal Rules of Civil Procedure require parties to disclose “all documents, electronically stored information, and tangible things” pertinent to a discovery request.<sup>165</sup> Yet the Data Protection Directive forbids a potential litigant to retain certain types of discoverable data without consent from the data subject.<sup>166</sup> Commentary about

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tional Rights and Privacy Act, 20 U.S.C. § 1232g (protecting confidential educational records). There is no U.S. statute that applies generally to online user privacy.

162. Claire Cain Miller & Kevin J. O'Brien, *Germany's Complicated Relationship With Google Street View*, N.Y. TIMES, Apr. 23, 2013, <http://bits.blogs.nytimes.com/2013/04/23/germanys-complicated-relationship-with-google-street-view/>; see also Lauren H. Rakower, Note, *Blurred Line: Zooming In On Google Street View And The Global Right To Privacy*, 37 BROOK. J. INT'L L. 317, 327 n.75 (2011) (“[I]n Germany, where the debate on surveillance is tinged with memories of the role played by the Nazis’ Gestapo and the East German Stasi secret police, doubts have been raised about the transparency of the [Google Street View] project.”) (citation omitted).

163. Charles Arthur, *Google Facing Legal Threat from Six European Countries over Privacy*, GUARDIAN, Apr. 2, 2013, <http://www.guardian.co.uk/technology/2013/apr/02/google-privacy-policy-legal-threat-europe>.

164. Tania Abbas, Note, *U.S. Preservation Requirements and EU Data Protection: Headed For Collision?*, 36 HASTINGS INT'L & COMP. L. REV. 257, 258 (2013).

165. FED. R. CIV. P. 26(a)(1)(A)(ii).

166. See Data Protection Directive, art. 6 (providing that “personal data must be . . . collected for specified, explicit and legitimate purposes and not



this conflict has traced its roots to the position of the right to privacy in European law as a fundamental right.<sup>167</sup>

The debate over how to limit and regulate targeted online advertising encapsulates some of the main perceived divergences between European and American privacy law. Targeted advertising, also called “behavioral advertising,” is the practice of sharing consumer information with a third-party advertising network or service so as to serve that consumer with advertisements tailored to their interests.<sup>168</sup> One of the easiest ways to tailor advertising to an individual is to create advertisements geared to their gender, although this can sometimes backfire.<sup>169</sup> Under European privacy law, consumers must give prior consent in order for electronic communications service providers to share their information with third-party networks and facilitate targeted advertising.<sup>170</sup> Under U.S. law, targeted advertising is largely governed by industry self-regulation.<sup>171</sup>

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further processed in a way incompatible with those purposes”); *see also* Abbas, *supra* note 1644, at 267 (“When a company retains data for litigation, EU law requires that the data subject explicitly consent to that use because this type of preservation is deemed ‘further processing’ that is conducted for a purpose unrelated to the reasons the data were originally collected.”).

167. Kristen A. Knapp, *Enforcement of U.S. Electronic Discovery Law Against Foreign Companies: Should U.S. Courts Give Effect to the EU Data Protection Directive?* 10 RICH. J. GLOBAL L. & BUS. 111, 125–26 (2010) (attributing the “conservative” discovery regime in Europe to the position of privacy as a fundamental human right under the Charter); Carla Reyes, *The U.S. Discovery-EU Privacy Directive Conflict: Constructing A Three-Tiered Compliance Strategy*, 19 DUKE J. COMP. & INT’L L. 357, 362 (2009). (“[G]iven the general distaste in civil legal systems for U.S. discovery procedures, it is only natural that in an area viewed as a fundamental human right, such as data privacy, the conflict would increasingly grow.”).

168. *Guide for Complying with DMA’s OBA Guidelines*, DIRECT MARKETING ASSOCIATION, <http://www.dmaresponsibility.org/privacy/oba.shtml> (last visited May 22, 2015).

169. Natasha Singer, *E-Tailer Customization: Convenient or Creepy?*, N.Y. TIMES, June 23, 2012, <http://www.nytimes.com/2012/06/24/technology/e-tailer-customization-whats-convenient-and-whats-just-plain-creepy.html>.

170. Council Directive 2009/136, art. 2(6), 2009 O.J. (L337) 11, 30–31.

171. AM. ASS’N OF ADVERT. AGENCIES ET. AL., SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 15–16 (2009), <http://www.iab.net/media/file/ven-principles-07-01-09.pdf> (providing an example of the U.S. atmosphere of self-regulation). This self-regulation depends on the principles of consumer “notice and choice.” FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE 27 (2012), <http://ftc.gov/os/2012/03/120326privacyreport.pdf>. While the Federal Trade Commission also enforces laws concerning unfair, deceptive, or fraudulent

Yet this type of difference collapses somewhat when it comes to the debate over regulating children's privacy online. Both the European and American systems emphasize parental notice and consent for certain online activities.<sup>172</sup> Specifically, both have evinced particular concern with children's school data.<sup>173</sup> In both systems, it is taken for granted that children deserve additional, special protections from intrusion online.

Policymakers often conceive of these differences in commercial regulation as extremely value-laden. In Congressional hearings about online privacy, advocates of self-regulation consistently resort to the view that European privacy law is completely divergent from American privacy law.<sup>174</sup> In 2011, Representative Pete Olson stated,

Our friends in the European Union believe that privacy is a fundamental human right and that government should be tasked with protecting and regulating personal data. . . . [T]he last thing we need to do is look toward Europe for guidance for new privacy regulations. Instead, we should use today's hearing to look at how the EU's overburdensome privacy laws have negatively affected the European Union economy and how we can avoid similar pitfalls.<sup>175</sup>

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trade practices, its enforcement is largely focused on ensuring that consumers may "make decisions about their data at a relevant time and context," not on preventing advertisers from collecting that data. *Id.* at i.

172. *E.g.*, Children's Online Privacy Protection Act § 1303, 15 U.S.C. § 6502 (1998) (emphasizing parental consent for online activities for children under 13); Eur. Data Protection Supervisor, Opinion of the European Data Protection Supervisor, "*European Strategy for a Better Internet for Children*," at 6 (July 17, 2012), [https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-07-17\\_Better\\_Internet\\_Children\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-07-17_Better_Internet_Children_EN.pdf).

173. See ARTICLE 29 DATA PROTECTION WORKING PARTY, *Opinion 2/2009 on the Protection of Children's Personal Data (General Guidelines and the Special Case of Schools)*, 398/09/EN (Feb. 11, 2009), [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp160\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp160_en.pdf); Valerie Strauss, *How Some School 'Data Walls' Violate U.S. Privacy Law*, WASH. POST, Feb. 21, 2014, <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/02/21/how-some-school-data-walls-violate-u-s-privacy-law/>.

174. See, e.g., *Internet Privacy: The Impact and Burden of EU Regulation: Hearing Before The Subcomm. on Commerce, Manufacturing, and Trade of the Comm. on Energy and Commerce*, 112th Cong. 7 (2011).

175. *Id.* (statement of Rep. Olson, Member, H. Comm. on Energy and Commerce).

For obvious reasons, advocates of more transatlantic cooperation take the opposite tack. In 2001, the then-chairman of the EU Data Protection Working Party testified before Congress that the differences between EU and U.S. privacy law did not render the systems “mutually opposed or absolutely irreconcilable.”<sup>176</sup> Rather, he argued that the EU data protection law left more room for self-regulation, especially through contract. In the same hearing, however, the chairman of the committee resorted to the same familiar argument about incompatibility.<sup>177</sup>

The U.S. and EU Member States approach the issue of privacy from different perspectives. Europeans are instilled with the belief that privacy is a fundamental human right. There are a number of reasons for this belief, including the vast and traumatic experiences of the Nazi regime during the 1940's. Another reason for this perspective is the simple fact that many EU countries are relatively new democracies. It was not long ago that Kings and Queens ruled throughout Europe. In the U.S., we take a different approach towards privacy as we have fundamental protections to free expression provided in the U.S. Constitution, including the First Amendment.<sup>178</sup>

Advocates of self-regulation often additionally rely on arguments about American legal culture in order to explain why the European model is inappropriate in the United States. The “American tradition” of “personal responsibility” counsels against binding privacy legislation because users should protect their own privacy.<sup>179</sup> Similarly, “opt-in” consent mechanisms, as required under European law, seem to violate the First Amendment.<sup>180</sup>

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176. *The EU Data Protection Directive: Implications for the U.S. Privacy Debate: Hearing before the Subcomm. on Commerce, Trade and Consumer Protection of the Comm. on Energy and Commerce*, 107th Cong. 12 (2001) (statement of Stefano Rodotà, Chairman, EU Data Protection Working Party).

177. *Id.* at 5.

178. *Id.*

179. Adam Thierer, *The Problem with Obama's 'Let's Be More Like Europe' Privacy Plan*, FORBES, Feb. 23, 2012, <http://www.forbes.com/sites/adamthierer/2012/02/23/the-problem-with-obamas-lets-be-more-like-europe-privacy-plan/>.

180. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1239 (10th Cir. 1999) (striking down an FCC regulation that required opt-in consent to share some customer information for marketing purposes on the basis that it was insufficiently narrowly tailored); *Need for Internet Privacy Legislation: Hearing before the*

While questions linger about the *substance* of these arguments, they are noted here because they illustrate that when it comes to privacy, the belief that the two legal systems are incompatible has currency in the community of policymakers as well as scholars. Yet both communities seem to uncritically accept the notion that privacy law governing corporate enterprises is divergent because the two regimes are rooted in different principles and traditions that treat the concept of privacy differently. Neither seems to appreciate that the right to privacy in both systems was conceptualized with something very different in mind.

### *B. Comparative and Foreign Law in the Courts*

Understanding the common, gendered roots of privacy can minimize conflict over the deployment of “foreign” legal concepts in constitutional adjudication. The citation of foreign law in U.S. Supreme Court opinions has invited criticism from scholars, policymakers, and Justices alike. In *Lawrence v. Texas*, Justice Kennedy cited a European Court of Human Rights case for the proposition that “Western civilization” recognized a right to engage in consensual homosexual conduct.<sup>181</sup> In dissent, Justice Scalia argued that the majority was not only cherry-picking its authority, but that decisions by “foreign nations” were irrelevant and “dangerous dicta.”<sup>182</sup> *Lawrence* provoked backlash from the House of Representatives, where Representative Tom Feeney introduced a resolution that

judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.<sup>183</sup>

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*Comm. on Commerce, Science, and Transportation*, 107th Cong. 26 (2001) (testimony of Fred H. Cate, Professor of Law, Indiana University School of Law) (suggesting that *U.S. West* requires that opt-in consent requirements can only exist where opt-out requirements have been previously judged insufficient).

181. *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003).

182. *Id.* at 598 (Scalia, J., dissenting) (emphasis in original).

183. Reaffirmation of American Independence Resolution, H.R. Res. 568, 108th Cong. (2004).

Additionally, dozens of states have considered measures that would restrict judges from looking to foreign law generally or Shari'a (Islamic law) in particular.<sup>184</sup>

Despite the reluctance to fully embrace European law as persuasive vis-à-vis U.S. rights, there has long been an understanding that Europe and the United States have some things in common, particularly when it comes to law on gender, sexual orientation, and human rights. Justice Ginsburg recently noted that the briefs for *Reed v. Reed*, an Equal Protection challenge to a preference for male estate administrators, had cited two West German Constitutional Court decisions related to gender equality.<sup>185</sup> Justice Ginsburg, who litigated the case, explained that she had included them for "psychological effect," suggesting, "If this is where the West German Constitutional Court is, how far behind can the United States Supreme Court be?"<sup>186</sup> As Jack Balkin puts it, "The rejection of some foreign constitutional law (as opposed to foreign law treated as part of our traditions) is based on a construction of most of the rest of the world as other or as 'not us.'"<sup>187</sup>

In the area of constitutional privacy rights—the basis for the *Lawrence* decision—the perception that European and U.S. traditions are incompatible and "not us" is particularly troubling, as it seems to turn a blind eye to this common tradition. While this should not dictate that courts adjudicating rights across the Atlantic Ocean should reach the same substantive results, it certainly should not mean that courts are prohibited from looking across the transatlantic divide for counsel. An example from the opposite vantage point: in a 1975 case known as *Abortion I*, Germany's Federal Constitutional Court struck down an abortion law that would have legalized abortion if performed by a licensed physician within the first twelve weeks of pregnancy.<sup>188</sup> "Pregnancy belongs to the intimate sphere of the

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184. See Andrea Elliott, *The Man Behind the Anti-Shariah Movement*, N.Y. TIMES, July 30, 2011, <http://www.nytimes.com/2011/07/31/us/31shariah.html?pagewanted=all>.

185. Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, *A Conversation With Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 24 (2013).

186. *Id.*

187. Jack M. Balkin, *The American Constitution as "Our Law,"* 25 YALE J.L. & HUMAN. 113, 118 (2013).

188. ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] [Federal Constitutional Court] Feb. 25, 1975, 39 BVerfGE 1, 1975 (Ger.), available at <http://www.servat.unibe.ch/dfr/bv039001.html>.

woman that is constitutionally protected by Article 2(1) in conjunction with Article 1(1) of the Basic Law,” the Court wrote. However, the woman’s right “freely to develop her personality” is limited by the “protected legal sphere of another”—in this case, the fetus.<sup>189</sup> The Court concluded that “the decision must come down in favor of the preeminence of protecting the fetus’s life over the right of self-determination of the pregnant woman.”<sup>190</sup>

In *Abortion I*, the Court explicitly considered and rejected the framework that the U.S. Supreme Court had adopted in *Roe v. Wade*, finding that this went “too far” for German constitutional law to accept.<sup>191</sup> This result was based on the Court’s finding that the drafters of the Basic Law largely understood the right to life in Article 2(2) to include fetal life.<sup>192</sup> Article 2(2) itself, they went on, had to be understood in light of Germany’s unique experience under National Socialism, which treated human life as a tool to be used by the state.<sup>193</sup> The fact that other Western countries had more “liberal” (albeit controversial) abortion laws was not relevant, given this constitutional background.<sup>194</sup>

Against objections that the citation of foreign authority is a tool to “advance[e] a politically progressive agenda otherwise

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189. *Id.*

190. *Id.*

191. *Id.* at 216.

192. *See generally id.*

193. *Id.* at 201–03 (“Dem Grundgesetz liegen Prinzipien der Staatsgestaltung zugrunde, die sich nur aus der geschichtlichen Erfahrung und der geistig-sittlichen Auseinandersetzung mit dem vorangegangenen System des Nationalsozialismus erklären lassen.”) (trans.: “The Basic Law is undergirded by principles of state design that can only be explained by historical experience and the spiritual and moral confrontation with the preceding system of National Socialism.”).

194. *Id.* at 203 (“Gegenüber der Allmacht des totalitären Staates, der schrankenlose Herrschaft über alle Bereiche des sozialen Lebens für sich beanspruchte und dem bei der Verfolgung seiner Staatsziele die Rücksicht auch auf das Leben des Einzelnen grundsätzlich nichts bedeutete, hat das Grundgesetz eine wertgebundene Ordnung aufgerichtet, die den einzelnen Menschen und seine Würde in den Mittelpunkt aller seiner Regelungen stellt.”) (trans.: “Compared to the omnipotence of the totalitarian state, which exercised unlimited control over all aspects of social life and to which the lives of individuals meant nothing in its pursuit of its state goals, the Basic Law has established a value-oriented regime in which individual people and their dignity stand at the center of all its laws.”).

blocked by democratic majoritarianism," the *Abortion I* decision suggests that there are very fruitful ways of engaging with persuasive foreign authority, while maintaining a unique constitutional culture and fidelity to domestic values.<sup>195</sup> Where constitutional rights stem from a common tradition, it is unwise to "emphasize differences where there appear to be none."<sup>196</sup> While it is obviously not the case that there are no differences between U.S. and European privacy *protections*, the differences between the privacy *rights* have been largely overstated.

### C. Law Enforcement Cooperation

Finally, recognition that the EU and U.S. approaches to the right to privacy are grounded in a common concern about family life, sex, and marriage might reduce friction over transatlantic initiatives to combat crime and terrorism. These issues come to the forefront regarding surveillance of terror suspects. The concern regarding perceived differences between European and American law has been of special significance when it comes to transatlantic data sharing. In the immediate aftermath of the September 11 attacks, the Central Intelligence Agency and Treasury Department subpoenaed thousands of records from the Society for Worldwide Interbank Financial Transactions ("SWIFT").<sup>197</sup> SWIFT is a Belgian banking consortium and is therefore subject to European law, but the data SWIFT provided came from its American servers.<sup>198</sup> After the Terrorist Finance Tracking Program ("TFTP"), was made public in 2006, the backlash from European data protection authorities was tremendous.<sup>199</sup> The Belgian data protection au-

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195. Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POL'Y REV. 33, 44 (2005).

196. Sujit Choudhry, *Living Originalism In India? "Our Law" and Comparative Constitutional Law*, 25 YALE J.L. & HUMAN. 1, 4 (2013).

197. See Eric Lichtblau & James Risen, *Bank Data is Sifted by U.S. in Secret to Block Terror*, N.Y. TIMES, June 23, 2006, <http://www.nytimes.com/2006/06/23/washington/23intel.html>.

198. Commission de la Protection de la Vie Privée [Belgian Data Protection Authority], *Avis relatif à la transmission de données à caractère personnel par la SCRL SWIFT suite aux sommations de l'UST* [Opinion on the Transfer of Personal Data by the CSLR SWIFT by Virtue of UST (OFAC) Subpoenas], SA2 / A / 2006 / 035, at 21 (Sept. 27, 2006), *unofficial translation available at* <http://www.steptoel.com/assets/attachments/2644.pdf>.

199. See, e.g., *id.*; ARTICLE 29 DATA PROTECTION WORKING PARTY, *Opinion 10/2006 on the Processing of Personal Data by the Society for Worldwide In-*

thority concluded that SWIFT had violated European data protection law, and the European Parliament voted down a deal to allow the data sharing to continue.<sup>200</sup>

In response to concerns about privacy intrusions a redrafted bill, passed by the European Parliament a few months later, included several redress mechanisms.<sup>201</sup> Under the new TFTP, Europol, the European police organization, must “verify” U.S. requests for information issued to EU-based banks. Additionally, the new agreement imposes a number of new safeguards, including narrow tailoring of the requests.<sup>202</sup> Yet in reviewing the activities conducted under the agreement, Europol’s Joint Supervisory Body concluded that US requests were “abstract,” “broad,” and “impossible” to verify.<sup>203</sup>

One potential reason that the TFTP continues to exist, despite its probable incompliance with European data protection law, is that the agreement may actually have little to do with the principles undergirding the right to privacy in European law. Indeed, part of the compromise that allowed the TFTP to move forward was that the United States would help the Europeans develop their own terrorist finance tracking system.<sup>204</sup> Objections to counterterrorism cooperation thus seem to reflect

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terbank *Financial Telecommunication (SWIFT)*, 01935/06/EN, 21 (2006), [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp128\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp128_en.pdf).

200. EUR. PARL. DOC. A7-0013, at 7 (2010), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2010-0013+0+DOC+PDF+V0//EN> (arguing that European law required a warrant or court order to obtain financial records).

201. *See* Agreement Between the United States of America and the European Union on the Processing and Transfer of Financial Messaging Data from the European Union to the United States for the Purposes of the Terrorist Finance Tracking Program, U.S.-E.U., June 28, 2010, <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Terrorist-Finance-Tracking/Documents/Final-TFTP-Agreement-Signed.pdf>.

202. *Id.* art. 4.

203. EUROPOL JOINT SUPERVISORY BODY, REPORT NO. JSB/INS. 11-07, REPORT ON THE INSPECTION OF EUROPOL’S IMPLEMENTATION OF THE TFTP AGREEMENT 5 (2011), [http://europoljsb.consilium.europa.eu/media/111009/terrorist%20finance%20tracking%20program%20\(tftp\)%20inspection%20report%20-%20public%20version.pdf](http://europoljsb.consilium.europa.eu/media/111009/terrorist%20finance%20tracking%20program%20(tftp)%20inspection%20report%20-%20public%20version.pdf).

204. *See, e.g.,* EUROPEAN COMM’N, EUROPEAN TERRORIST FINANCING TRACKING PROGRAMME ROADMAP 2 (2010), [http://ec.europa.eu/governance/impact/planned\\_ia/docs/2011\\_home\\_003\\_terrorist\\_financing\\_tracking\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2011_home_003_terrorist_financing_tracking_en.pdf).



transatlantic competition and spite, not principled differences between the right to privacy under the two regimes. We can reconcile this seeming contradiction by recalling that the right to privacy as understood in Europe has more in common with the American tradition than is usually recognized. Financial information is perhaps simply not that sensitive.

Concerns for privacy have markedly increased in light of recent disclosures about National Security Agency ("NSA") wiretapping. In fact, it is in this area that concern about government intrusion on "private life" is most prevalent. In initial coverage of the NSA wiretapping program, which collected telephony "metadata" on hundreds of millions of Americans, discussion swirled around the meaning of "metadata" and its potential for intrusion. Much of the coverage focused on the inappropriateness of government surveillance of private life. For example, a recent article about metadata surveillance focused on the revelatory nature of the information at issue:

[T]he government knows when we've called a rape hotline, a domestic violence hotline, an addiction hotline, or a support line for gay teens. . . . If, for instance, the government knows that, within an hour, we called an HIV testing service, then our doctor, and then our health insurance company, they may not 'know' what was discussed, but anyone with common sense—even a government official—could probably figure it out.<sup>205</sup>

Recent coverage of "leaky apps," mobile applications that share user information, has critiqued these applications' disclosure of "users' most sensitive information such as sexual orientation—and one app recorded in the material even sends specific sexual preferences such as whether or not the user may be a swinger."<sup>206</sup> Although the technology of surveillance may have changed substantially, it appears that European and American definitions of what is "private" are largely similar.

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205. Dahlia Lithwick & Steve Vladeck, *Taking the "Meh" Out of Metadata*, SLATE (Nov. 22, 2013, 12:07 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/nsa\\_and\\_metadata\\_how\\_the\\_government\\_can\\_spy\\_on\\_your\\_health\\_political\\_beliefs.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/nsa_and_metadata_how_the_government_can_spy_on_your_health_political_beliefs.html).

206. James Ball, *Angry Birds and 'Leaky' Phone Apps Targeted by NSA and GCHQ for User Data*, GUARDIAN, Jan. 28, 2014, <http://www.theguardian.com/world/2014/jan/27/nsa-gchq-smartphone-app-angry-birds-personal-data>.

Perhaps not surprisingly, these revelations have prompted even more of a backlash in Europe, including serious proposals of building a “European internet” so that European citizens would not have to “send emails and other information across the Atlantic.”<sup>207</sup> Yet even here, the reasons for this reaction are misconstrued as based on “[t]he country’s experience with the Nazi and east German Stasi secret police, which recruited vast networks of informers.”<sup>208</sup> While the role of new technology is discussed both repeatedly and at length, questioning of the reasoning and motives for protecting “private life” is conspicuously absent.

## CONCLUSION

This Article has demonstrated that contemporary accounts of European privacy law are historically, analytically, and descriptively overstated. The roots of contemporary privacy protection in Europe are not simply about one’s right to control information, but rather about a particular type of control—a man’s right to control his family life. That no straight line can be drawn from the original drafting of privacy protections to today’s regulatory setting should be obvious: legal protections change and evolve with time. Yet time and again, policy-makers and scholars rely on the exceptional historical background of European privacy law as a rationale for intransigence, uncooperativeness, and even spite. While new technologies have undoubtedly complicated informational privacy because they have made it easier to collect, store, and use information,<sup>209</sup> current scholarship has failed to consider in depth the reasons why we consider certain information to be “private” in the first place. However, the twenty-first century protections of information privacy are themselves inextricably linked to non-informational privacy—to a concept of “private life” that arose in a setting we, today, feel uncomfortable in. As with the American edition of Goebbels’s novel, which conveniently left out the title’s reference to “German destiny,” the story of Euro-

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207. Jeevan Vasagar & James Fontanella-Khan, *Angela Merkel Backs EU Internet to Deter US Spying*, FIN. TIMES, Feb. 16, 2014.

208. Stevan Wagstyl & James Fontanella-Khan, *Germany Struggles to Respond to NSA Revelations*, FIN. TIMES, Nov. 17, 2013.

209. See, e.g., Daniel Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477, 483 (2006) (“New technologies have given rise to a panoply of different privacy problems.”).

pean privacy law is missing a subtitle that, in retrospect, turns out to be quite significant.